BRIEF OF PLAINTIFFS IN ERROR

The Supreme Court of the United States

OCTOBER TERM, 1918

No. [redacted]264

JOSEPH V. STILSON, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA.

No. [redacted]265

JOSEPH SHUKYS, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

I. ABSTRACT OF THE CASE.

This is a writ of error made in behalf of the defendants, Joseph V. Stilson and Joseph Shukys, who were convicted of conspiracy:

1. Under Section 4, Title I of the Espionage Act of June 15, 1917, 40 Stat. 217, 219, to violate certain provisions of Section 3 of the Act, to wit, "* * * whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000, or imprisonment for not more than twenty years, or both," and

2. Under Section 37 of the Criminal Code, to wit, "If two or more persons conspire * * * to commit any offense against the United States * * *, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both," to violate certain provisions of the Selective-Service Act of May 18, 1917, 40 Stat. 80, to wit, Section 5, referring to persons subject to registration.

The questions involved (owing to the fact that many questions which might have been raised have been decided by the Supreme Court, unchanged in personnel, since the passage of the Espionage and Selective Serive Acts) narrow down to:

1. Whether or not, in ruling that there could be no severance of defendants and that a peremptory challenge by one defendant should count as a challenge by all defendants, the trial Judge was in error under Article VI of the Amendments to the United States Constitution.

2. Whether or not the trial Judge erred in his charge to the jury in that portion thereof in which he said the jury might determine the guilt of the defendants from general information.

3. Whether or not the trial Judge erred in not refreshing the jury's memory as to the evidence.

4. Whether or not the trial Judge erred in overruling a motion to take the case away from the jury, and in refusing to charge the jury, "Under all the evidence your verdict should be 'not guilty.'"

The defendants were indicted jointly with two others, as above set forth, on September 10, 1918. They were found guilty by a jury on October 4, 1918, the two others having left the jurisdiction of the Court and not having been apprehended. The acts alleged against the defendants occurred between June 1 and September 7, 1917, and consisted in publishing and distributing reading matter in the shape of mimeographed circulars and printed newspapers in the Lithuanian language. The reading matter referred to is reproduced in the Transcript of Record (pages 4-25). The acts alleged to have been committed by the defendants and to constitute the crime charged in the indictment are not the same under the two counts. The overt acts under Count 1 number nine (R. 4-23); under Count 2 they number two (R. 24, 25). The defendants were sentenced, after a motion for a new trial and argument, on December 6, 1918, to: Stilson, three years imprisonment, and Shukys, three months imprisonment.

II. SPECIFICATION OF ERRORS.

The four questions involved are raised, as follows:—

1. By an exception granted to the ruling of the trial Judge, refusing to grant a severance of the defendants (R. 63); and by exceptions granted by the trial Judge to the refusal to allow challenges for each of the defendants alone (as to Stilson, R. 31, 33) (as to Shukys, R. 33, 35).

2. By an exception granted by the trial Judge (R. 224), to that portion of his charge to the jury (R. 216, 217), which reads as follows:—

"The next question for you to determine is the presence of *essential elements. One* of them is, for instance, that the United States is at war. *Secondly*, that what was done was an *attempt to cause insubordination*, or what was done did amount to *obstructing enlistment*, and the question may arise in your mind how are you to determine *that*. Whenever you are asked as a jury to pass upon anything which is a matter within *common knowledge*, common information, things which people ordinarily know, which are generally and practically universally known, when you are passing upon such questions, you have the right to call upon your *general knowledge and information*. You must determine, *for instance*, the question whether or not we are at war, because unless we are, this indictment goes for nothing. You may determine that from your general information this something of which, in the phrase of the law, the law takes *judicial* notice. *So also* when you come to determine the question of whether or not there was an attempt to *cause insubordination*, you take, of course, all the evidence into the case, and you have a right to direct your minds, as naturally you would, to the character of these publications themselves, these pamphlets and these articles, and determine from them, *assisted by all the other evidence in the case*, whether or not they do reach the dignity of the charge of *attempting to cause insubordination;* or amount to an *obstruction of enlistment.*"

3. By that part of the trial Judge's charge to the jury (R. 214, 215), which reads as follows:—

"Therefore, you get down to the evidence in the case. I do not intend to delay you by going over it, because it is fresh in your memories, and I could not adequately discuss it without going over all of it, and that would take up an unnecessary amount of your time. It has been discussed by counsel with a fairness

on both sides and with an ability that I am sure has been refreshing to all of you. It is with the highest gratification that anybody connected with the trial of cases experiences the atmosphere of not only fairness, but the atmosphere of candor and consideration for each other, that has been manifested throughout this case by counsel both on the one side and on the other, and I am sure you have appreciated that to the same extent as has the Court."

4. By an exception granted by the trial Judge (R. 121, 122), to a motion to dismiss the charges against both defendants and take the case from the jury; and by an exception granted by the trial Judge to defendants' point 1, requesting the trial Judge to charge (R. 223), namely:—

"1. Under all the evidence, your verdict should be 'not guilty.'"

III. ARGUMENT.

1. As to a severance and as to a challenge by one defendant counting as a challenge for all defendants.

The sixth amendment to the Constitution of the United States reads in part as follows:—

"In all criminal prosecutions, the accused shall enjoy the right to a * * * trial, by an imparial jury * * *."

It is admitted, the question of a severance is a matter within judicial discretion, but it did seem to the defendants in such a serious case, where the defendants were manifestly, if guilty, of different degrees of guilt, that a severance should be granted, especially, since they were, individually, denied their full number of challenges. The motion, refusal and

exception may be found on page 63 of the Transcript of Record.

This leads to a consideration of the challenges.

Juror No. 55, Jacob H. Lamor (R. 31), was challenged by the defendant Stilson, individually. He was satisfactory to the defendant Shukys (R. 33).

Juror No. 53, William P. Kinsey (R. 33), was challenged by the defendant Shukys, individually. He was satisfactory to the defendant Stilson (R. 35).

The trial Judge ruled that each of the above challenges should be counted against both of the defendants and granted an exception in each case to his ruling (R. 33, 35).

Subsequently, both of the defendants challenged seven additional members of the panel (No. 73, R. 44, 45), (No. 90, R. 47, 49), (No. 34, R. 49, 50), (No. 50, R. 52, 53), (No. 17, R. 53, 54), (No. 49, R. 54, 56), (No. 23, R. 59, 60).

The Government challenged two members of the panel (No. 71, R. 45, 46), (No. 82, R. 28, 29).

All of the above challenges were peremptory challenges. In view of the fact that the trial Judge had made his ruling with regard to peremptory challenges, as above set forth, it was manifestly impossible for either of the defendants to make additional challenges and maintain his right to individual challenges, since, under the trial Judge's ruling, a total of nine challenges had been allowed, and both of the defendants had only exercised their right for a total of eight challenges. In other words, each of the defendants claimed a right to ten challenges, and, therefore, a right to two more challenges than those already exercised; while, under the trial Judge's ruling, both of the defendants were only entitled to one additional challenge.

By the Act of March 3, 1911, C. 231, Sec. 287, after stating the number of challenges, it provides:—

> "And in all cases where there are several defendants * * * the parties * * * shall be deemed a single party for the purposes of all challenges * * *."

In U. S. *vs.* Marchant, 12 Wheat. 480, 481.

Mr. Justice Story said, "Upon a joint trial, each prisoner may challenge his full number, and every juror challenged as to one, is withdrawn from the panel as to all the prisoners on the trial, and thus in effect, the prisoners in such case possess the power of peremptory challenge to the aggregate numbers to which they are respectivly entitled. This is the rule clearly laid down by Lord Coke, Lord Hale and Serjeant Hawkins, and indeed, by all the elementary writers." This decision was rendered under the Act of 1790 which did not contain a provision as set forth in the Act of 1911 as above noted.

In U. S. *vs.* Hall, 44 Fed. 883 (1890),
under the Act of 1840, which contained a provision similar to the one above noted, it is true it was held that such a provision (1) did not deny the defendants an impartial jury (Article VI, Amendment to Constitution) and (2) was not unconstitutional. But this case was not fully argued, and was not decided by the Supreme Court.

There is a practical side to this question which is bound to work hardship to individual defendants under certain circumstances. If such is the case, the Act cannot remain law, since it would sometimes work hardship and sometimes not work hardship. The result would not be *impartial* to the defendants in many cases.

Such a case would arise where the number of defendants was odd and the number of challenges allowed was even. Suppose, as in this case, ten challenges were allowed to the defendants, and there were three defendants, and suppose that each defendant was antagonistic to both of the others and each defendant had separate counsel. Manifestly, if one defendant used four challenges and each of the others used three challenges, all of the challenges would be used up, and no more would be allowed, even if the second and third defendants wanted to make an additional challenge. This would be giving more rights to one defendant than to the others, and would, in effect, be an "unequal administration of the law," which is just

as much forbidden under our decisions as the enforcement of a law which is unequal in its terms. Certainly, such is the law under the Fourteenth Amendment with respect to the States.

Indeed, this same condition of affairs could arise where there was an even number of challenges allowed, say ten, and there was an even number of defendants, say four. In such a case, it might happen that the defendants would, through force of circumstances, have one, two, three and four challenges each, respectively, though every one of those having less than four challenges might wish to exercise more challenges.

It is only where the number of defendants divided into the number of challenges gives an equal quotient AND *where the Court*, by rule or otherwise, *divides up the challenges equally*, that the law could be made to apply equally.

This matter, presumably, has not come before the Supreme Court, but it is now the law as borne out by practice.

2. AS TO THE CHARGE TO THE JURY THAT IT MIGHT DETERMINE THE GUILT OF THE DEFENDANTS FROM GENERAL INFORMATION.

The second specification of errors gives the full text of the trial Judge's charge in this respect, together with the references to the Transcript of Record. It was a fair statement to the jury with regard to judicial notice; but, at the same time, it had directly connected with it other matter which had no reference to judicial notice and which, undoubtedly, had its effect on the minds of the jury, which presumably was not familiar with the technical meaning of judicial notice.

The defendants think that judicial notice is for the Court to charge the jury, while admitting that the mere question as to whether or not we are at war is a trivial point to raise; but, further the defendants think that linking judicial notice as an attribute of a jury's functions in the patent case of war or no war with the difficult case of

determining an attempt to violate law from an inspection of documents worked a great hardship on the defendants and tended to jeopardize their case with the jury.

In Mobile, etc., R. Co. *vs.* Ladd, 92 Ala. 287,

and Cash *vs.* State, 10 Humpr. (Tenn.) 111,

it was held to be the duty of the Court to charge the jury in the trial of a cause as to the existence of facts of which judicial cognizance is taken.

There is no doubt a jury may act on matters of common observation within their general knowledge WITHOUT ANY TESTIMONY on those matters; but they are matters of general knowledge, as, for example, the following:—

Gin is intoxicating.

Comm. *vs.* Peckham, 2 Gray (Mass.) 514.

Children are invariably curious and play about unprotected lumber piles.

Murdock *vs.* Summer, 22 Pick. (Mass.) 156;
Spengler *vs.* Williams, 67 Miss. 1.

Common abbreviations of words.
Matters of history.
Things of universal and even local recognition.
Division of time, &c.
Ad infinitum.

But here the jurors in their examination had said that they knew nothing about the case, had not read or heard or talked about it, &c. How then could they "so also" take judicial notice and decide the meaning of documents from general information, the existence of war, the turmoil of society, the common information about spies, the common knowledge about plots?

The defendants think this part of the charge to the jury lessened the jurors' sense of responsibility, to be guided only by the evidence and not by their beliefs as members of the community.

In People *vs.* Harris, 77 Mich. 568, for instance, it was held error for the Court to tell a jury they were not at liberty to disbelieve as jurors what they would believe

as men, and that their oath imposed on them no obligation to doubt where no doubt would exist in its absence.

Likewise in Adams *vs.* State, 135 Ind. 571,
and Siberry *vs.* State, 133 Ind. 677.

In Hale *vs.* State, 122 Ala. 85,
the charge that the jury has a right to look to the reasonableness of any testimony, and if they believe any testimony unreasonable and contrary to their observation and experience they may disregard it, was held misleading, the Court saying: "It (the part of the charge) makes the whole test of the reasonableness of testimony by the jury to depend on the fact that they think it reasonable according to their own experience and observation."

"Judicial notice or knowledge is the cognizance of certain facts which judges and juries may, under rules of legal procedure or otherwise, properly take and act on WITHOUT PROOF because they already know them," is the definition given by the "Cyclopedia of Law and Procedure."

McKelvey on Evidence, 2d ed., page 18, says:—

> "The doctrine of judicial notice is that there are certain facts of which the COURT will not require evidence, because they are so well known, so easily ascertainable or so related to the official character of the Court that it would not be good sense to do so."

But here there was TANGIBLE evidence. Certainly the Court did not mean to say to the jury: "You can decide whether or not there is a war from your common knowledge of affairs; *likewise* you can decide from these documents AND your common information whether or not these people attempted to cause insubordination and did obstruct recruiting."

Negatively, it is no invasion of the province of a jury for the Court to state in its charge that it will take judicial knowledge of facts that courts notice without proof.

People *vs.* Mayes, 113 Cal. 618;
Koch *vs.* State, 115 Ala. 99;
Cash *vs.* State, 10 Humphr. (Tenn.) 111.

3. AS TO THE TRIAL JUDGE NOT REVIEWING THE TESTIMONY FOR THE BENEFIT OF THE JURY.

The trial Judge did not attempt to refresh the jury's memory as to the evidence, which ran into three full days (R. 214, 215); and he did not point out that, even though the case was conspiracy, certain of the evidence did not apply directly to the defendants on trial.

It is admitted that recapitulation of the evidence is discretionary with the trial Judge as to DETAIL.

11 Ency. Pl. & Pr. 199, 200;
Fowler *vs.* Smith, 153 Pa. 639.

It is also admitted that the trial Judge is not bound to recapitulate ALL OF THE EVIDENCE.

Allis *vs.* United States, 153 U. S. 117.

But the Court should not omit or slur over the strong points on either side.

Borham *vs.* Davis, 146 Pa. 72.

Though the evidence is conflicting, each party is entitled to have the law given to the jury which is applicable to his theory of the case and the TESTIMONY of his witnesses.

Sperry *vs.* Spaulding, 45 Calif. 549.

In this case, the defendant's evidence as to the time a note was made and transferred was contradicted by the payee and endorsee. The jury might have *inferred* from this that all of the defendant's testimony was untrue. Held, it was the Court's duty to instruct the jury, and the defendant was entitled to the instruction, that it did not necessarily follow from the contradictory testimony that all of defendant's testimony was untrue.

In this case, there were two theories. The Government contended that the defendants were conspirators because they belonged to the same organization (The Lithuanian Socialist Federation); and because, though they held dif-

ferent positions in such organization, they occupied the same room in a building where the printed matter was published. The defendants, on the other hand, contended that no conspiracy was proved; because, while admitting the facts urged by the Government, there was no proof that there was any understanding, tacit or otherwise, between the defendants as to such publication, and no proof, first, that the defendant Stilson took part in such publication, except as to one newspaper article with his name printed at the bottom thereof, and, second, that the defendant Shukys, had anything to do with it, except as a paid employee, not knowing the subject matter on which he did mechanical work.

4. As to all the evidence warranting a verdict of "not guilty" by direction.

It is true, of course, "If the case should have gone to the jury, the jury were the sole judges of the facts put before them;" and no one could say that they had decided wrongly. The question is: "Should the case have gone to the jury?"

In this case, four people were accused of conspiracy, two only being present. Three groups of overt acts were offered in testimony: (1) a single mimeographed circular, (2)general newspaper articles and (3) one article signed by one of the defendants on trial. There was no evidence to show either of those on trial responsible for the articles under (2) except that they worked in the same room where the paper was published and that one of the defendants, for purposes of mailing, filled out a post office form and called himself manager and his co-defendant secretary. On the contrary, there was direct evidence that they had nothing to do with what was published, except in the case of (3) where Stilson admitted he wrote the article. There was nothing to show the connection of either defendant with (1) except that a typewriter found on the premises may have cut the stencil from which it was mimeographed,

and that the one circular was found on the premises in a pigeonhole over the desk of an editor who was also indicted but had fled the jurisdiction.

That the defendant Stilson might be guilty under the espionage act under (3) is conceivable; but the Government evidently thought such a case was weak, so they *dropped such an indictment* and coupled him with three others under a general charge of *conspiracy*.

But Shukys does not even have this against him. There was no attempt to show he ever wrote anything or used the typewriter.

Outside of the fact that the two defendants were confessedly pacifists and Socialists, there was nothing to show any concerted action or any responsibility, other than stated above in reference to Stilson and (3), though the jury might have *guessed* that both defendants knew or ought to have known what was published.

> "Proof of mere suspicion, or bare knowledge, that the act is being done by others, without such intentional participancy in or connection with it, is not sufficient. * * * mere knowledge, without more * * * would not make the person a party to the acts."
>
> U. S. *vs.* Newton, 52 Fed. 275.

Granting the connection of Shukys with the publication of Kova, is he responsible for the acts of the editors, when he is not shown affirmatively to have wilfully and knowingly participated in any wrongful act? There is a Pennsylvania case along this line where a conspiracy prosecution was based upon the collective wrongful acts of a school board and all the members were convicted. The Superior Court set aside the verdict holding that where certain members were guilty as proved, others merely because of membership on the board could not also be convicted, but "it must be shown affirmatively that such members participated with the others in the criminal confederation."

Comm. *vs.* Tilly, 33 Super. 35.

> "It is not sufficient to connect any officer or agent of the company with the conspiracy that they knew of it or acquiesced in it. They must by word or deed have become a party to it."
>
> Patterson *vs.* U. S., *222* Fed. 631.

As to the defendant Stilson who was not connected with the publication of the paper as editor or manager, does not the case of Marrash *vs.* U. S., 168 Fed. *225*, apply, where the Court said:—

> "We are unable to find sufficient evidence against Habib Marrash. There are some suspicious circumstances and facts which seem to indicate that he had knowledge of the illegal nature of the transactions, but there is nothing which rises to the dignity of proof *required in criminal cases.* Knowledge by an alleged co-conspirator that the other defendants were attempting to defraud is not enough. Mere suspicion that he was a party to the conspiracy is not enough."

As to both Stilson and Shukys in the light of a charge of conspiracy, ought not the language used in McClarty *vs.* U. S., 191 Fed. 518, to be applied:—

> "Imputation to one person of the acts of another cannot in criminal cases find adequate basis in mere moral or argumentative considerations. Criminally a man can only be held responsible for what he does or actually procures to be done."

and again:—

> "A mere failure on the part of the conspirator to prevent another from doing the act of his own volition cannot be sufficient (to establish a conspiracy on his part) unless we disregard clearly established canons of statutory interpretation."

Although only one article was directly connected with one defendant, the Government was allowed, after informal

remonstrance by the defendants, to send out with the jury a great mass of printed matter, typewritten aricles, newspaper files, &c., the very volume of which would tend to make the jury believe that "where there was so much smoke there must be some fire." Where the Government had 34 formal exhibits of record (R. 185), they were physically connected with or bound to thousands of other papers, especially in the case of the files of the newspaper, Kova. In some cases an exhibit consisting of a few lines of printed matter was sandwiched in with a whole bound volume of the issues of the newspaper. The very weight and volume of the exhibits and their impedimenta were bound to have their effect upon any jury.

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